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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Eric M., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC M.,

Defendant and Appellant.

D074491

(Super. Ct. No. J JL000177)

APPEAL from an order of the Superior Court of San Diego County, William D. Lehman, Judge. Affirmed and remanded with directions.

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

When apprehended for illegally crossing the border, Eric M. punched a border patrol agent in the face. Eric admitted that he resisted an executive officer in the performance of his or her duties (Pen. Code,¹ § 69). The juvenile court found that Eric came within the court's jurisdiction and detained him in juvenile hall pending disposition. Eric subsequently moved for an order making the required factual findings to enable him to petition the United States Citizenship and Immigration Services for special immigrant juvenile (SIJ) status under federal law. (8 U.S.C. § 1101(a)(27)(J) (the SIJ statute).) The juvenile court denied the request for SIJ findings, gave Eric credit for the 138 days he served in juvenile hall and released him from probation department custody.

Eric appeals, contending that the juvenile court erred in failing to make the requested findings in support of his application for SIJ status. He asserts that it is not in his best interest to be returned to El Salvador where he claims his parents are unable to protect him from conscription into a violent gang that has threatened his life.

He also argues that the record is unclear whether the charge he admitted was a misdemeanor or a felony and requests that the matter be remanded to the juvenile court to determine the character of the offense. The People concede this latter error, and we agree that a remand is appropriate. We otherwise affirm.

¹ Undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND²

Sixteen-year-old Eric ran away from El Salvador without his parents' permission. He worked in Mexico near the border selling candy. His goal was to enter the United States and become employed so he could send his son money. One day Eric and three friends decided to enter the United States illegally. Eric reported that he consumed 13 beers and used methamphetamine before deciding to jump the fence into the United States. Eric stated that he would not have entered the United States illegally had he been sober.

Eric reported using methamphetamine daily, marijuana weekly, and alcohol monthly. He had completed school to the fourth grade. Eric claimed that his parents treated him well and that he has a two-year-old son and a girlfriend in El Salvador.

Eric admitted the charge of resisting an executive officer in the performance of his or her duties (§ 69). The probation report recommended that Eric be declared a ward of the court, committed to juvenile hall for 60 days, and that wardship be terminated upon release from juvenile hall and Eric returned to his parents' custody in El Salvador.

Defense counsel moved for an order declaring Eric eligible for SIJ status. Eric's supporting declaration stated that before he left El Salvador, an MS-13 gang member threatened to kill him if he did not join the gang or pay a \$1,000 weekly tax to the gang. He claimed that his parents were unable to protect him from the gang and that gang members killed one of his cousins last year. Eric stated that he has an uncle in Virginia, but he has not spoken with him in some time and did not know whether his uncle could

² We base our factual summary on the probation report.

support him. Eric did not want to go to school but planned to find employment and send money home.

At a hearing on the motion, defense counsel explained that the juvenile court needed to declare Eric a ward of the court for Eric to be eligible to apply for SIJ status. Therefore, counsel requested that the court proceed with the dispositional hearing and that Eric be placed on formal probation and remain in probation department custody. The court continued the matter to give the prosecution additional time to research and respond to defense counsel's motion.

The probation officer filed an updated report after speaking to Eric's father in El Salvador. Eric's father stated that he was willing to have Eric come home but preferred that he stay in the United States due to the gang presence in El Salvador. He stated that on two occasions a local gang had threatened his family to give the gang money. Eric's father claimed that he did not have concerns about his other two sons being targeted by gangs because they were involved in positive activities, such as work and church. Eric's father denied that Eric had ever been physically, emotionally, or sexually abused. He further stated that he believed that Eric used drugs and that Eric did not have much schooling because of the problems in El Salvador.

After hearing from the parties, the court took the matter under submission. At a subsequent hearing, the court indicated that it would follow the probation officer's recommendation to terminate wardship and return Eric to his parents in El Salvador. The court questioned Eric's credibility, noting inconsistencies in Eric's story. The court found that Eric lacked a prior record and committed a sudden impulsive act when he struck the

border patrol agent. The court believed that Eric belonged with his family in El Salvador and found it would be impossible for the probation department to monitor his behavior in El Salvador. The juvenile court also found that Eric involved himself in antisocial or gang-related activity because Eric's siblings did not have a problem with gang threats.

Citing *In re Precious D.* (2010) 189 Cal.App.4th 1251 (*Precious D.*), the juvenile court rejected Eric's argument that his parents could not protect him. The court concluded that Eric would be safe in El Salvador if he "abides by the law" and declared that it would not make the findings requested by counsel declaring Eric eligible for SIJ status. The court denied the motion and denied defense counsel's request to refer the matter to social services, stating that counsel could pursue that avenue.

DISCUSSION

I. *SIJ STATUS*

A. *The SIJ Statute*

"The Immigration Act of 1990, codified at [title 8 United States Code] section 1101, sets forth a procedure for classification of certain aliens as special immigrants who have been declared dependent "on a juvenile court." ' [Citation.] 'Congress created this classification to protect abused, neglected, and abandoned unaccompanied minors through a process that allows them to become permanent legal residents. . . . A minor who obtains SIJ status may become a naturalized United States citizen after five years.' [Citation.] 'While the federal government has exclusive jurisdiction with respect to immigration [citations], including the final determination whether an alien child will be granted permanent status as an SIJ [citations], state juvenile courts . . . [¶] . . . are charged

with making a preliminary determination of the child's dependency and his or her best interests, which is a prerequisite to an application to adjust status as a special immigrant juvenile.' " (*Eddie E. v. Superior Court* (2013) 223 Cal.App.4th 622, 626.)

"A state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country." (*Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 351 (*Leslie H.*)). The SIJ statute calls upon the juvenile court to make three findings: "(1) the minor is 'dependent' upon a juvenile court or 'committed to, or placed under the custody of,' a state entity or other court-appointed individual or entity; (2) the minor cannot be reunified with one or both parents 'due to abuse, neglect, abandonment or a similar basis found under State law'; and (3) it is not in the minor's 'best interest' to be 'returned' to his or her country of origin." (*In re Israel O.* (2015) 233 Cal.App.4th 279, 284, *italics added.*) "A superior court with jurisdiction to make child custody determinations under California law 'has the authority and duty to make [SIJ status] findings' if the evidence before it supports those findings." (*Id.* at pp. 284-285.)

We review the juvenile court's findings for substantial evidence. (*Leslie H., supra*, 224 Cal.App.4th at p. 347.) The substantial evidence standard of review is perhaps the most difficult standard of review to overcome because a reviewing court does not determine the facts. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405.) " ' "Under this standard, we do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. Instead, we draw all reasonable inferences in support

of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is other evidence supporting a contrary finding. [Citations.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings." ' ' (In re Alexandria P. (2016) 1 Cal.App.5th 331, 354.)

B. *Analysis*

Eric contends that the juvenile court erred in denying his request for the required factual findings to apply for SIJ status. He claims that the evidence supported a finding that he was dependent upon the juvenile court, reunification with his parents was not viable, and it was not in his best interest to be returned to El Salvador. Eric concedes that the evidence does not show that his parents abused, neglected, or abandoned him, but contends that he was at substantial risk of serious physical harm as a result of his parents' inability to protect him. He also asserts it is not in his best interest to be returned to El Salvador based on the gang threat against his life. If returned home, Eric claims that his options are to join the gang, pay the gang tax or die.

As a preliminary matter, the juvenile court reasonably questioned Eric's credibility; specifically, Eric's claim that he would not be safe if returned to El Salvador. When initially detained, Eric provided false information stating that he was an adult. Eric admitted that he had been intoxicated when he crossed the border with three friends and told officers that he would have not entered the United States illegally if he had been sober. This statement suggests that Eric made an impulsive decision to cross the border. Eric, however, later changed his story claiming that he came to the United States to

provide a better life for his family. Additionally, Eric never told officers that gang threats prompted him to come to the United States. It was not until Eric filed his declaration in support of his motion, over a month later, that he claimed an MS-13 gang member tried to recruit him and threatened to kill him if he did not join the gang or pay a \$1,000 weekly tax. Although Eric's father mentioned two gang threats directed toward his family, he did not mention that gangs had specifically threatened Eric. This conflicts with Eric's claim that he had discussed the gang threats he had received with family members. On this record, the trial court was entitled to disbelieve Eric's safety fears if returned to El Salvador.

It is undisputed that Eric's parents did not abuse, neglect, or abandon him. Eric claims that a similar basis prevents him from being reunified with his parents in El Salvador; namely, a basis for jurisdiction exists under Welfare and Institutions Code section 300, subdivision (b)(1) because he is at substantial risk of serious physical harm or illness based on the inability of his parents to control his behavior. As a result, Eric claims that it is not in his best interest to return to El Salvador because his parents cannot protect him. Although the record contains conflicting evidence, the juvenile court made a credibility determination and substantial evidence supports the court's ultimate conclusion.

Eric's father told the probation officer that he and Eric's mother live in El Salvador with Eric's two siblings. The father reported a large gang presence in El Salvador and stated that the family had been threatened twice for money. The father did not mention that gangs had threatened Eric. The father stated that Eric's siblings did not have a

problem with gangs because they were "involved in positive things, such as work and church" and that Eric "chose a different path than his siblings." From these statements the juvenile court could reasonably infer that Eric chose antisocial activities, including gang involvement.

Based on this evidence, the juvenile court reasonably concluded that Eric's poor choices, including daily methamphetamine use, caused his alleged gang-related problems. Moreover, it is uncontradicted that, other than an uncle in Virginia, Eric has no one in the United States to provide support. In contrast, Eric's father stated that he was willing to have Eric come home. Especially in light of Eric's existing drug use and prior gang involvement, removing Eric from his parents is unlikely to protect Eric from gangs and drugs as both are prevalent in the United States.

Finally, as Eric concedes, the termination of his wardship precludes him from applying for immigration relief based on classification as an SIJ. (See 8 C.F.R. § 204.11(c) ["An alien is eligible for classification as a special immigrant under [8 United States Code section 1101(a)(27)(J)] of the Act if the alien: [¶] . . . [¶] (5) Continues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended"].) "The purposes of juvenile wardship proceedings are twofold: to treat and rehabilitate the delinquent minor, and to protect the public from criminal conduct." (*In re Jose C.* (2009) 45 Cal.4th 534, 555.) We review "a commitment decision for abuse of discretion, indulging all reasonable inferences to support the juvenile court's decision." (*In re Angela M.* (2003) 111 Cal.App.4th 1392, 1396.)

The record fails to support Eric's argument that the juvenile court abused its discretion in declining to maintain jurisdiction over him. By the time of the dispositional hearing, Eric had already been in juvenile hall for 138 days for an offense where the probation officer recommended a 60-day commitment. The juvenile court found that Eric lacked a prior record of delinquent behavior. Eric does not challenge this finding. Eric also does not argue, nor does the record suggest, that he displayed behavioral issues or criminal tendencies while in custody that might merit continuation of the wardship proceeding. Rather, the totality of the evidence supports the juvenile court's conclusion that Eric "committed a sudden impulsive act when he struck the border patrol agent after the agent grabbed him off of the fence"

Eric urges that a Welfare and Institutions Code section 300 dependency proceeding would preserve his eligibility SIJ status absent parental abuse, neglect or abandonment. Welfare and Institutions Code section 300, subdivision (b)(1) "authorizes dependency jurisdiction without a finding that a parent is at fault or blameworthy for her failure or inability to supervise or protect her child." (*In re R.T.* (2017) 3 Cal.5th 622, 624, 627-633, 636-637 & fn. 6 [disapproving *Precious D.*, *supra*, 189 Cal.App.4th 1251, and rejecting the reasoning requiring parental neglect for jurisdiction as set forth in *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820].) Although pursuing a juvenile dependency proceeding under Welfare and Institutions Code section 300 was an option, the juvenile court's findings do not support such a petition. The juvenile court found Eric's fear for his safety if returned to El Salvador not credible. Thus, despite the juvenile court's erroneous citation to *Precious D.*, this credibility determination undercuts Eric's claim

that his parents are unable to protect him and that he is at substantial risk of serious physical harm if returned to his home in El Salvador. We do not "reweigh the evidence, evaluate the credibility of witnesses or indulge in inferences contrary to the findings of the trial court." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.) Accordingly, Eric has failed to show that it is not in his best interest to return to El Salvador.

On this record, we conclude that the juvenile court did not err when it declined to make the requested SIJ eligibility findings.

II. NATURE OF ADJUDICATION AS FELONY OR MISDEMEANOR

Resisting an executive officer in the performance of his or her duties is a wobbler that can be treated in the court's discretion as a felony or a misdemeanor. (§§ 17, 69.) Eric contends that the record is unclear whether the juvenile court exercised its discretion to designate the wobbler as a felony or a misdemeanor under Welfare and Institutions Code section 702. He asserts that the matter should be remanded to the juvenile court to determine the character of his offense. The People agree.

When a minor is found to have committed an offense that "would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or [a] felony." (Welf. & Inst. Code, § 702.) The court is required to make an "explicit declaration" whether a wobbler offense is a felony or a misdemeanor. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1204; Cal. Rules of Court, rule 5.780(e)(5) ["the court must . . . expressly declare on the record that it has made such consideration, and must state its determination as to whether the offense is a misdemeanor or a felony"].) This rule ensures that the juvenile court is aware of—and

actually exercises—its discretion to treat the offense as a felony or misdemeanor. (*In re Manzy W.*, *supra*, 14 Cal.4th at p. 1207.) If the court did not make an express determination but the record shows it was aware of—and exercised—its discretion, the matter need not be remanded. (*Id.* at p. 1209.) However, if the record does not show such an exercise of discretion, the matter must be remanded for the court to do so. (*Ibid.*)

According to the court's minute order, the prosecution moved to amend the petition by adding a felony violation of section 69 and Eric entered an admission to a misdemeanor offense. The reporter's transcript for the hearing reflects that Eric was prepared to admit the offense, designated as a felony, but the admission did not indicate that Eric was admitting to a felony or a misdemeanor and the juvenile court did not mention whether the offense would be considered a felony or a misdemeanor.

Subsequently filed probation reports stated that Eric had admitted to a felony. At the dispositional hearing, the court stated that Eric "admitted the offense as a misdemeanor, not as a felony, as indicated in the probation officer's report." The juvenile court, however, never made an express finding regarding whether the offense was a felony or a misdemeanor. The Attorney General concedes, and we agree, that the record does not disclose whether the juvenile court recognized or exercised its discretion to treat the offense as a misdemeanor. Accordingly, on this record, a remand is appropriate.

DISPOSITION

The disposition order is affirmed. The matter is remanded to the juvenile court to exercise its discretion to declare whether Eric's violation of Penal Code section 69 will be treated as a felony or a misdemeanor.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.